IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 397

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR ROBERT G. FITCHIE, JAMES G. KENNEDY, STEVE C. SUMNER, FRED DAHMS, F. RAY BRYANT, JOHN O'CONNOR, AND DAVID A. RISKIND, CERTAIN APPELLEES.

JOSEPH A. PADWAY,
Attorney for Appellees.

DAVID A. RISKIND,
ABRAHAM W. BRUSSELL,
Of Counsel.

PRINTED BY CHICAGO LAW PRINTING CO.

INDEX.

PAGE

Cases Cited.

PAGE

Cases Cited (continued).

PAGE

Cases Cited (continued).

Texts and Book References.

PAGE

STATUTES AND LEGISLATIVE MATERIAL.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 397

UNITED STATES OF AMERICA,

Appellant,

vs.

THE BORDEN COMPANY, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR ROBERT G. FITCHIE, JAMES G. KENNEDY, STEVE C. SUMNER, FRED DAHMS, F. RAY BRYANT, JOHN O'CONNOR, AND DAVID H. RISKIND, CERTAIN APPELLEES.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This brief is on behalf of Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred Dahms, F. Ray Bryant, John O'Connor and David A. Riskind, appellees in this Court, defendants in the trial court. We shall refer to them as defendants.

All defendants except Riskind were officials of the Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an affiliate of the American Federation of Labor, a voluntary unincorporated association of individuals (R. 9-10, Paragraphs 39 and 40). David A. Riskind was attorney for said union.

In this brief the aforesaid defendants contend on behalf of "the" union as they did in the court below, that there could be no indictment of the union.

For purposes of convenience we shall refer to the aforesaid Milk Wagon Drivers' Union, Local 753, etc., as the "defendant union", and to the aforesaid individual defendants as "union officials".

Questions in Common.

On this appeal there are certain "common" questions of law that are being urged by the various other defendants before this court on this appeal. To avoid unnecessary repetition, we shall not repeat these arguments but instead respectfully refer this court to the other briefs filed on behalf of the other defendants, raising these common questions of law. By this means we seek to avail ourselves of these common questions of law raised by the other briefs. In this brief we shall urge *only* such questions of law that are unique or peculiar to the defendants on whose behalf this brief is filed.

The Indictment Concerning Defendants.

The indictment charges that defendant union is a voluntary unincorporated Association of individuals in Chicago, Illinois. Individual members of the union are employed by distributors (R. 2) in Chicago in connection with sale

and distribution of fluid milk in Chicago. The union had a membership in excess of 5,000 members of which about 75% were employed by the major distributors (R. 2). The individual defendants with their official capacity or position with the union are listed (R. 9-10, Pars. 39-40).

Count I charges a conspiracy by *all* defendants in violation of the Sherman Act to fix prices to be paid by all distributors to all producers for all fluid milk produced in the various foreign states on approved dairy farms, which milk so produced was later shipped from those states into the City of Chicago (R. 11). Under Count I, the union and the union officials were charged with the following overt acts "pursuant to and in execution of the conspiracy":

(1) To restrain and impede transportation of fluid milk into the City of Chicago shipped to certain independent distributors.

(2) To restrain and impede distribution within the City of Chicago of fluid milk by certain independent distributors.

(3) By denying membership in Local 753 to duly qualified drivers in the employ of certain independent distributors (R. 14).

Count II charged a conspiracy by all defendants in violation of the Sherman Act to fix prices for the sale by the distributors in the City of Chicago of fluid milk shipped into Chicago from various foreign (R. 17) states. Under Count II the union, and the union officials were charged with the commission of overt acts in execution of this conspiracy identical with the three acts alleged with regard to County I stated *supra*, and a fourth overt act so charged was that of compelling independent distributors to sell fluid milk at fixed prices (R. 19).

County IV charged a conspiracy by all defendants in violation of the Sherman Act to restrain and obstruct the supply of moving milk moving in the channels of interstate commerce into the City of Chicago from the various foreign states (R. 25). The overt acts charged against the union and the union officials to accomplish this conspiracy were:

(1) To resort to threats, acts of violence or other coercive means against certain independent distributors;

(2) To deny membership in Local 753 to duly qualified drivers in the employ of certain independent distributors;

(3) To prevent, hinder and restrain transportation and delivery of fluid milk into the City of Chicago to independent distributors (R. 28).

(Count III is not involved in this appeal. The Government's brief so admits by not assigning error on the trial court's ruling in sustaining the demurrer as to Count III. In addition this Court has so ruled).

OUTLINE OF ARGUMENT.

I.

The Sherman Anti-Trust Act of 1890 does not apply to labor unions or labor union activities, and the defendant union and the defendant union officials cannot be prosecuted under the Anti-Trust Act of 1890.

A. The true congressional intent of the Sherman Act was to apply this Anti-Trust law only to business combinations and not to apply the Anti-Trust law to labor unions and their activities.

B. This Court should adopt the true congressional intent of the Sherman Anti-Trust law and should overrule its prior decision in Loewe v. Lawlor.

C. Detailed Evidence of Legislative History of the Sherman Act.

II.

By the passage of Section 6 of the Clayton Act of 1914, Congress intended to overrule this Court's decision in Loewe v. Lawlor.

A. The true Congressional intent of Section 6 of the Clayton Act was to adopt and make clear beyond all doubt the original intention of the Sherman Act of 1890 to apply only to business combinations and not to labor combinations.

B. This court should overrule its prior decision in Duplex Press v. Deering, which disregarded the Congressional intent of Section 6 of the Clayton Act.

III.

Recent Federal legislation indicates congressional recognition of the same economic differences between labor and capital that impelled the Federal Congress to exclude labor unions and their activities from the Federal Anti-Trust Laws.

IV.

The indictment does not charge a violation of the Sherman Act as it has been construed and interpreted by this Court.

A. If the Sherman Act is not applicable to labor unions and their activities, then the defendants cannot be indicted under this particular statute for causing a restraint of trade.

B. Even assuming the Sherman Act were applicable to the facts charged in the indictment, the allegations of Counts 1 and 2 as to the fixing of prices is a reasonable restraint of trade by labor unions within the meaning of the decisions of this court construing the statute.

C. Even assuming the Sherman Act is applicable to labor unions or their activities, the facts charged in the indictment do not show a direct, substantial or unreasonable restraint of interstate commerce or trade by the defendants within the meaning of the decisions of this court.

V.

Under Section 8 of the Sherman Act, a labor union being a voluntary, unincorporated association is not a legal entity, and cannot be indicted for an alleged criminal violation of Section 1 of the Sherman Act.

ARGUMENT.

I.

The Sherman Anti-Trust Act of 1890 does not apply to labor unions or labor union activities, and the defendant union and the defendant union officials cannot be prosecuted under the Anti-Trust Act of 1890.

Under propositions I and II of our argument we frankly ask the court to overrule certain of its prior decisions. We support these requests by sound authority and respected precedents.

Asking this court to overrule prior decisions is not the usual argument in cases before this Court. But the case at bar is of great social importance and legal significance. The attorneys for the union and union officials, notwithstanding their recognition of the due weight to be attached to the careful decisions of justices of this Court and of other Federal Courts, nevertheless believe that the soundness of their contentions and the importance of this case requires such argument be made.

The case at bar is analogous to those cases where this Court has within the last three years recognized that the principle of *stare decisis* is not an ironclad guarantee for the perpetuation of undisputed error. It is with this premise in mind that we respectfully ask this Court to consider first, the Sherman Anti-Trust Act of 1890 (under I), and second, Section 6 of the Clayton Act of 1914 (under II) under the following general headings in an attempt to determine the legislative intent either to include or exclude labor unions from the domain of the Anti-Trust Laws:

(1) The economic and social background prior to the Sherman Act of 1890 and of Section 6 of the Clayton Act of 1914;

(2) The legislative history of the proposed bills that finally culminated with the enactment of each statute;

(3) Contemporary reaction at and after the passage of the respective statutes.

A. The true congressional intent of the Sherman Act was to apply this Anti-Trust law only to business combinations and not to apply the Anti-Trust law to labor unions and their activities.

(1) *The Economic and social background of the Sherman Act of 1890.* The Sherman Act came into being as a result of the "trust" evils arising after the end of the Civil War. This Court has so stated. Mr. Chief Justice White in *Standard Oil Co.* v. *United States,* 221 U. S. 1 at Page 50, (1911) said concerning the causes for the enactment of the Sherman Act:

> "... that the main cause which led to the legislation was the thought that it was required by economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the economic development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the wide spread impression that their power had been and would be exerted to oppress individuals and injure the public generally." 221 U. S. at Page 50.

Even more emphatic is the analysis of Mr. Justice Harlan, who, although dissenting in part, agreed with the

"causes of enactment" described by Chief Justice White, in stating his version:

> "All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery—fortunately, as all now feel—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. . . .
>
> Guided by these considerations, and to the end that the people, so far as interstate commerce was concerned, might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the Anti-Trust Act of 1890. . . ." 221 U. S. at 83-84.

Nothing is said about labor unions.

In discussing "Trust Legislation" writers have called attention to the popular agitation against big business symbolized by the trust giants of the industrial world. Thus, the Granger Laws of the 1870's, the Federal Interstate Commerce Act of 1887, the Anti-trust laws of various states passed during the 1880's indicated the popular tendencies of the day. These popular tendencies demanded

and obtained the passage of the Sherman Act of 1890. With respect to the origin of this statute, it is also stated:

> "Clearly the law was inspired by the predatory competitive tactics of the great trusts, and its primary purpose was the maintenance of the competitive system in industry."
>
> 15 Encyclopaedia Social Sciences, at P. 113, (See the Bibliography at pp. 121, 122.)

Other writers in the fields of economics and political economy agree that the social history of the 1880's indicate that the Anti-trust legislation arose out of the evils of business individuals and business corporations. The writers do not recognize the "labor unions" as an evil requiring Anti-Trust legislation.

In the late 1880's there was no recognition of prospective danger to the American public arising from the existence or the activities of organized labor. This was before the organization of labor on a national scale. The Knights of Labor had by the period of 1890 become negligible in social effect. (Charles A. Beard "History of the United States" at P. 608.)

The debates in Congress including the rationale advanced by the sponsor of the Anti-Trust Legislation recognized that the "popular mind" was greatly concerned with the evils resulting from "concentration of wealth" into large combinations that resulted in combinations to destroy competition. See the words of Senator Sherman, 21 Cong. Rec. 2457, and 2460.

Beard "History of the United States," P. 492.

We contend that Congress intended to apply the Sherman Act of 1890 to business combinations—and did not

intend to include labor unions under such Anti-Trust Laws; this intent is clearly and conclusively shown by the Legislative History of proposed bills, the Congressional Debates and the Committee Reports.

The entire subject of the Congressional intent concerning labor in the passage of the Sherman Act is exhaustively treated by the "scholarly research" [of the kind mentioned by Justice Brandeis in *Erie R. R.* v. *Tompkins*, 304 U. S. 64, 73-74, (1938)] in:

Edward Berman "Labor and the Sherman Act" (1930).

From this leading source and from other authorities cited therein it is conclusive that Congress did not intend to have the Sherman Anti-Trust Act apply to labor unions or their activities; the purpose of that legislation—as its description implies—was to affect Business Combinations, *i.e.*, the entrepeneur, not the laborer.

The law is undisputed that the Court considers Congressional records in arriving at the "Congressional intent."

Loewe v. *Lawlor*, 208 U. S. 274, 301 (1908).

It was stated that in interpreting the Sherman Act, the *debates* too will be considered for the purpose of

"... ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted."

Standard Oil Co. v. *United States*, 221 U. S. 1, at 50 (1911).

Other decisions to the effect that debates in the Senate and the House though not directly available to "explain the meaning of the words of the statute", nevertheless will

be considered as reflecting light upon the general purposes of the Legislature and the evils which the Legislature sought to remove are:

Humphrey's Executor v. *United States*, 295 U. S. 602, 625, (1935).

Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643, 650 (1931).

But the Government may argue that *Loewe* v. *Lawlor*, 208 U. S. 274, decided in 1908 held that the Sherman Act was applicable to labor unions.

In that event we answer:

B. This Court should adopt the true congressional intent of the Sherman Anti-Trust law and should overrule its prior decision in Loewe v. Lawlor.

Loewe v. *Lawlor*, 208 U. S. 274, decided in 1908 should be overruled because it was erroneously decided upon inadequate presentation by counsel to the Court.

In *Loewe* v. *Lawlor*, 208 U. S. 274 (1908) this Court disposed of the entire legislative history of the Sherman Act on the basis of the inadequate and incomplete facts stated in the brief for plaintiff in error to the effect that the several provisos which expressly exempted organizations of farmers and laborers from an *original* Sherman bill (which was never enacted) indicated congressional intent to include farmers and labor organizations in the bill, subsequently reported back by the Judiciary Committee—which latter bill was ultimately adopted as Section 1 of the Sherman Act. The brief on behalf of the union failed to *directly* raise the point that Congress did not intend to reach labor unions. The only contention made by the union having even a slight bearing on this question

was that the Sherman Act did not affect the union because they were not engaged in interstate commerce, had no aim to restrain it, and had not used any means to directly restrain interstate commerce (208 U. S. at 280-283).

This Court in its opinion sums up the legislative history by saying that

> "The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the Act and that all these efforts failed, so that the Act remained as we have it before us."
>
> 208 U. S. at Page 301.

But this conclusion of the Court as we shall show *infra* under C by **detailed evidence** was based upon incomplete presentation by counsel for the union in that they failed adequately to present the complete legislative history not only of the original Sherman bill and the final statute as enacted, but also failed clearly to show to this Court the fact that the provisos exempting labor organizations which were added to the original Sherman bill were attached to anti-price raising measures. The Judiciary Committee bill which became the Sherman Anti-Trust Law was not an anti-price raising measure. The Senate as shown by debates believed that there was no necessity of *expressly* providing for exempting labor organizations from the Judiciary Committee measure. Also, the plaintiff in error's brief gave this Court the impression that the labor exemption provisos were omitted as a result of debates on which the general question of the propriety of discriminating in behalf of labor organizations was discussed by the Senate. This is not the fact. *The fact is that the labor provisos were not separately omitted but*

were discarded with the rest of the original Sherman Bill by the Judiciary Committee. The original Sherman Bill was sent to the Judiciary Committee not because the labor provisos which had been adopted troubled the senators, but because numerous obstructive "humorous" and probably unconstitutional amendments had been added in such a fashion as to require complete revision of the measure by the Judiciary Committee.

The original Sherman Bill provoked frequent debates as to whether or not it would reach farmer and labor organizations. But the Judiciary Committee bill after being reported back to the Senate occasioned no discussion of this question during the prolonged debates in both the Senate and the House. The reason, therefore, must have been that it was understood and accepted that the bill reported by the Judiciary Committee did not reach labor and farmer organizations even though the original Sherman Bill seemed so to do.

In addition, the brief for the plaintiff in error in *Loewe v. Lawlor*, 208 U. S. 274, argued that after the passage of the Sherman Act and after the construction by the lower courts to the effect that the Sherman Act did apply to labor organizations, numerous proposals to Congress to exempt labor organizations failed to pass therefore indicating congressional intent to include labor within the Sherman Act. However, that brief also *failed* to mention that all except one of these proposals were proposals to render illegal those combinations which prevented competition and which raised prices. But these proposals were broader than the Sherman Act of 1890. The fact that there were specific provisos to exempt labor organizations from *such* later bills does not indicate congressional intent to include labor organizations in the Sherman Act of 1890.

See Edward Berman "Labor and the Sherman Act" (1930) at Page 85.

Berman severely criticizes counsel for the union in their presentation of the union side of the cause to this Court.

See Edward Berman "Labor and The Sherman Act" (1930) at Page 86.

Counsel for the present defendants are not aware of any case where this Court has been *expressly* requested to overrule the decision in *Loewe* v. *Lawlor*, 208 U. S. 274. This Court should overrule *Loewe* v. *Lawlor* because the decision is clearly wrong. The argument has been made that this Court in disregarding the congressional intent is acting in an "unconstitutional manner." See the vigorous language by dissenting Justice Mr. Harlan in *Standard Oil Co.* v. *United States*, 221 U. S. 1, where he stated that in referring to what he called the most important aspect of this case:

> "... That aspect concerns the usurpation by the judicial branch of the Government of the functions of the legislative department. The illustrious men who laid the foundations of our institutions, deemed no part of the National Constitution of more consequence or more essential to the permanency of our form of Government than the provisions under which were distributed the powers of Government among three separate, equal and co-ordinate departments—legislative, executive and judicial."
>
> 221 U. S. at 103.

In that case, Mr. Justice Harlan contended that in adopting the "rule of reason," this Court was acting as a legislative body in violation of our Constitution. Whether that contention be correct or not, in placing labor organizations within the Sherman Act or in ignoring the clear literal meaning of Section 6 of the Clayton Act, has not this Court done something which is more than legislating

—has it not gone *contrary* to the intention of Congress? In this case, we are simply asking that this Court follow the congressional intent. This may involve the overruling of prior decisions. In view of the constitutional command that the departments of Government of the United States are to be separate and distinct, there is analogy to the reasoning of Mr. Justice Brandeis in the case of *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938). If as Mr. Justice Brandeis expressed in that case, this Court in overruling the numerous precedents that had accumulated for more than a period of one hundred years was not bound by "traditional" error, then it is doubly true in the case at bar that *Loewe* v. *Lawlor* should be overruled. In 1890 Congress did not intend to include labor organizations within the meaning of the Sherman Act. In 1914 by Section 6 of the Clayton Act Congress was determined not only to reaffirm its position of 1890 but to obviate the results flowing from judicial legislation by this Court (See II, *infra*). It should follow that this Court will not choose to be bound by the principle of *stare decisis*, but will be obligated under the imperative direction of our Federal Constitution to declare that the indictment under the Sherman Act against the labor union or its officials for labor union activities cannot be sustained.

In addition to Constitutional obligation, we have the argument of social desirability. At the present time, the social wisdom of the Anti-Trust laws is being seriously questioned in many quarters. It has been stated that

> "In recent years the Anti-Trust laws of the United States have been praised, condemned and amended more than any other one piece of Federal legislation. Some regard them as the bulwark of industrial liberties, while others see them as a Procrustean bed to which only Labor is required to conform."

Vol. 147, "Annals of the American Academy of Political Science" Foreword, (1930).

See also John D. Clark, "The Federal Anti-Trust Policy," pp. 56-57, 243, 270 (1931).

There is precedent under the decisions of this Court for "overruling precedent" under the Sherman Act for this Court has already several times in its history overruled prior decisions arising under the Anti-trust laws. For example, the decisions in the Rule of Reason cases overrules the earlier decisions of this Court, such as the *Trans-Missouri* cases. See *Standard Oil Co.* v. *United States,* 221 U. S. 1 at Pages 85 and 89. The decision in the *Northern Securities Company* v. *United States,* 193 U. S. 197 decided in 1904 in substance overruled the decision in *United States* v. *E. C. Knight Co.,* 156 U. S. 1, decided in 1895. The decisions in the *Maple Flooring Manufacturing Association* v. *United States,* 268 U. S. 563, decided in 1925, and *Appalachian Coals* v. *United States,* 288 U. S. 344, decided in 1933, in substance overruled the decision in *American Column and Lumber Co.* v. *United States,* 257 U. S. 377, decided in 1921.

Recent decisions of this Court which indicate that the principle of *stare decisis et non quieta movere* does not preclude this Court from determining the correctness of its prior position are:

1. Those cases which indicate this Court's recognition of the expansion of the Federal Commerce Clause;
2. Cases indicating the recognition by this Court of the expansion of the protection offered by the Federal Due Process Clause;
3. The expansion of the protection offered by the Equal Privilege Clause;

4. The expansion of the limits of administrative admissibility;
5. The expanding limits of the General Welfare Clause.
6. The State and Federal "income tax" cases.
7. Decisions such as *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938).

It is respectfully submitted that this Court should not be precluded by *Loewe* v. *Lawlor* from reexamining the contention now advanced that the Sherman Anti-Trust Act does not apply to labor unions and their activities. Upon such re-examination that decision should be overruled.

C. Details and evidence of legislative history of the Sherman Act.

Prior to 1890 various bills against trusts had been introduced in both Houses of Congress. A complete legislative history of the various bills is found in "Bills and Debates Relating to Trusts, No. 147, Senate Documents, Volume 14, 57th Congress, 2nd Session, Pages 11, *et seq.*"

Also prior to 1890 various bills were introduced prohibiting arrangements tending to prevent full and free competition or tending to advance the cost of articles to the consumer. When these bills were debated, amendments expressly exempting labor organizations and organizations of farmers were offered (20 Cong. Rec. 1459). Discussion there indicated that the Congress desired to exclude labor and farmer organizations even from those statutes which would prohibit restraints of competition or the increase of prices to the consumer.

See Edward Berman "Labor and the Sherman Act" (1930) at Page 12.

A bill was originally presented by Senator Sherman on December 4th, 1889, entitled "A Bill to Declare Unlawful Trusts and Combinations in Restraint of Trade and Production." This bill was discussed, referred to the Committees on Finance of which Senator Sherman was chairman, and two amendments made by the Finance Committee were reported back to the Senate. On March 21st, 1890, the Bill as reported back was debated extensively in the Senate. The debates may be found in the Bills and Debates in Congress relating to Trusts, Senate Documents 147, 57th Congress, Second Session, at 1903. The debates indicated that some of the senators felt that the wording of the Sherman Bill which prohibited "restraint of full and free competition and combinations * * * or made with a view or which tend to advance the cost to the consumer" might relate to farmer and labor organizations because such organizations were concerned with raising "wages and prices" that they received. See the following references:

21 Cong. Rec. Pages 2467, 2468 (Senator Hiscock)
21 Cong. Rec. Page 2560 (Senators Teller and George)

The senators clearly indicated that they did not intend to prevent laborers and farmers from raising wages.

The important provisions of this original Sherman bill are as follows:

> "Section 1. That all arrangements, contracts, agreements, trusts or combinations between two or more citizens or corporations . . . of different States, or . . . which tend to prevent full and free competition . . . and all arrangements, trusts, or combinations between such citizens or corporations *made with a view or which tend to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful and void. . . .*" (Italics ours.)

This bill clearly failed to provide protection for labor unions in their attempts to raise wages which would result in raise of "costs" to the consumer.

Senator George specifically pointed this out (20 Cong. Rec. 1459).

Senator Teller argued that nobody intended to have this bill apply to labor unions. He said:

> "I know that nobody here proposes to interfere with the class of men I have mentioned. Nobody here intends that by any of these provisions, either in the original bill or in any amendment; and I have only called attention to it to see if the effort of those who have undertaken to manage this subject cannot in some way confine the bill to dealing with trusts which we all admit are offensive to good morals." (21 Cong. Rec. 2562.)

Senator Sherman claimed his bill was not intended to reach labor unions. He said:

> "It does not interfere in the slightest degree with voluntary associations made to affect public opinion to advance the interests of a particular trade or occupation. . . . And so the combinations of workingmen to promote their interests, promote their welfare, and increase their pay, if you please, to get their fair share in the division of production, are not affected in the slightest degree, nor can they be included in the words or intent of the bill as now reported." (21 Cong. Rec. 2562.)

Senator Hoar answered Senator Edmunds' argument that labor and capital should be treated alike. He said:

> "If I correctly understood the Senator from Vermont (Edmunds) . . . he thought that the applying to

laborers in this respect a principle which was not applied to persons engaged in the large commercial transactions, which are chiefly aimed at by this bill was indefensible in principle. Now it seems to me that there is a very broad distinction which, if borne in mind, will warrant this exception to the general provision of the bill. When you are speaking of providing to regulate the transactions of the men who are making corners in wheat and in iron or in woolen or cotton gains, speculating in them, or lawfully dealing in them without speculation, you are aiming at a mere commercial transaction, the beginning and end of which is the making of money for the parties, and nothing else. . . . The laborer who is engaged lawfully and usefully and accomplishing his purpose in whole or in part in endeavoring to raise the standards of wages is engaged in an occupation, the success of which makes Republican government itself possible and without which the Republic cannot continue to exist.

"I hold, therefore, that as legislators we may constitutionally, properly, and wisely allow laborers to make associations, combinations, contracts, agreements for the sake of maintaining and advancing their wages, in regard to which, as a rule, their contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side. When we are permitting and even encouraging that, we are permitting and encouraging what is not only lawful, wise, and profitable, but absolutely essential to the existence of the commonwealth itself.

"When, on the other hand, we are dealing with one of the other classes, the combinations aimed at chiefly by this bill, we are dealing with a transaction the only purpose of which is to extort from the community,

monopolize, segregate, and apply to individual use for the purposes of individual greed, wealth which ought properly and lawfully and for public interest to be generally diffused over the whole community." (21 Cong. Rec. 2728.)

After some discussion concerning the desirability of referring the Sherman Bill to the Committee on the Judiciary, Senator Sherman offered a proviso exempting labor and farmer organizations from the operation of the bill.

The next day, March 26, 1890, an additional proviso was offered by Senator Aldrich for the purpose of exempting labor. This too was adopted (21 Cong. Rec. 2643-2654; 2655). Thereafter, certain encumbering amendments were proposed and adopted by the Senate acting in a "humorous mood."

Edward Berman "Labor and the Sherman Act" (1930) at Page 22.

The Senators consciously adverted to the fact that labor organizations and the like were not the evils at which the statute was aimed and in fact must be protected against attack or prosecution under the statute.

Senator Stewart (21 Cong. Rec. 2565)

The debates between Senator Hoar and Senator Edmunds clearly indicate that in enacting Anti-Trust legislation congress was not including labor union activities.

Senator Edmunds (21 Cong. Rec. 2727)
Senator Hoar (21 Cong. Rec. 2728)

Senator Hoar analyzed and discussed the comparative situations of labor and capital in the economic society of 1890 and pointed out the "economic differences."

After considerable debate the Bill as amended was referred to the Judiciary Committee to be reported out within twenty days.

After consideration the Judiciary Committee reported "back" with the Bill that was enacted as Section 1 of the Sherman Act. *Both the original Sherman Bill and the "proviso" amendments were eliminated.* The following tables illustrate the significant differences between the Sherman Act of 1890 and the proposed bill concerning which the Senators had voiced fears that they applied to labor unions.

Bill as referred to Judiciary Committee with Sherman amendment (proviso clause):

"All arrangements, contracts, agreements, trusts or combinations between two or more citizens or corporations . . . which tend to prevent full and free competition . . . and all arrangements, trusts or combinations between such citizens or corporations made with a view or which tend to advance the cost to the consumer of any such articles are hereby declared to be against public policy, unlawful and void, *provided* that this act shall not be construed to apply to any ar-

Bill as reported by Judiciary Committee which made it unnecessary to have Sherman amendment:

"Sec. 1. Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be

Bill as referred to Judiciary Committee with Sherman amendment (proviso clause):	Bill as reported by Judiciary Committee which made it unnecessary to have Sherman amendment:
rangements, agreements, or combinations between laborers, made with the view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agricultural or horticultural products."	deemed guilty of a misdemeanor. . . ."

The Senate debated upon the measure reported back by the Judiciary Committee. But the debates did not touch upon any question of exemptions for labor unions. It was assumed that the committee bill did not "cover" labor unions. The Senators were concerned with the problem whether the measure proposed by the Judiciary Committee would serve the intended purpose of eliminating the "business evils."

As typical of the Senate debate after the bill was reported from the Judiciary Committee, Senator Hoar said that the bill was in answer to the complaints

> "from all parts and all classes of the country of these great monopolies which are a *menace to Republican institutions*. . . . . We have affirmed the old doctrine of

the common law in regard to all interstate and international *commercial* transactions." (Italics ours.) (21 Cong. Rec. 3146.)

These debates show that the Senate *must* have assumed that the Judiciary Committee measure did "*sub silentio*" do that which the Senators stated they wished to avoid: *i. e.*, avoid applying Anti-Trust legislation to labor organizations and their activities.

Also, the debates in the House of Representatives on the Judiciary Committee proposal indicate that the House, too, treated the Judiciary Committee measure as being inapplicable to labor organizations.

The records show that no person in the House expressed any reference as to the possible application of the law to labor unions. A reference to labor unions was made by way solely of illustration in the remarks of Representative Stewart on June 11th, 1890, in a discussion of the bill as reported by the House and Senate Conferees. Stewart in criticizing the bill on the ground that he thought that it would compel unwise competition among the railroads, remarked in the course of his argument:

"Why do the laborers organize and combine to put up the price of labor, and so enhance the cost of everything to the consumer? Because of excessive competition. Yet my friend from Missouri (Rep. Bland) does not propose to apply any remedy in that direction. Nothing more largely affects the cost of articles to every consumer—than *the combinations of labor. Who complains of it? I do not.* I think the *laborer is justified,* where competition is excessive . . . in entering into combinations for self-protection" (21 Cong. Rec. 5956). (Italics ours.)

Here again is legislative recognition of the fact that labor organizations and their activities were *not* the evils at which the legislation was aimed. Here too is legislative recognition of the unique position of labor unions in the system of American economy; that even though higher wages obtained by unions may result in a price increase to the consumer, nevertheless our economic system regards *this* price increase as justifiable.

Accordingly, the House adopted the Judiciary Committee measure. The Judiciary Committee measure was finally enacted and is the Sherman Act as it now stands in the statute books.

What conclusion can be drawn from the foregoing legislative history other than Congress did not intend to include labor unions within the Sherman Act?

Contemporary opinion.

Apparently the Congressional intent to exclude labor unions from the domain of the Sherman Act was well known to contemporary opinion.

Samuel Gompers, in 1910, then President of the American Federation of Labor, stated:

> "'We know the Sherman law was intended by Congress to punish illegal trusts and not the labor unions, for we had various conferences with members of Congress while the Sherman Act was pending, and remember clearly that such a determination was stated again and again" (17 American Federationist, 197, 202).

During the course of the inquiry by the United States Commission on Industrial Relations, Commissioner Lennon answered in reply to an assertion by a lawyer who said that the Sherman Act was intended to apply to labor unions:

"I had the pleasure of interviewing Senator Sherman and Senator Plumb and a large number of gentlemen in the Senate at the time, and they did not look upon it in that way." 16 Report of U. S. Commission on Industrial Relations (1916) P. 10854.

To the same effect as shown in autobiographies of individuals most prominent in the enactment of the Sherman Act, see:

2, Hoare, "Autobiography of Seventy Years," 264.
2, Sherman, "Recollections of Forty Years."

The Attorney General of the United States in 1893 recognized that the Federal district (trial) judges had ignored the intention of the authors of the Sherman Act, for in his "Annual Report for 1893," in discussing the Sherman Anti-Trust Law, he first referred to the application of the statute to "businesses," and then he added:

"It should, perhaps, be added, in this connection—*as strikingly illustrating the perversion of a law from the real purpose of the authors*—that in one case the combination of laborers known as a 'strike' was held to be within the prohibition of the statute, and that in another, rule 12 of the Brotherhood of Locomotive Engineers was declared to be in violation thereof."

at pp. XXVII-XXVIII. (Italics ours.)

Finally, the entire history of the proposed enactment as shown in Vol. 21 of the Congressional Record, especially from March 21, 1890 to the enactment of the Sherman Law on July 2, 1890 shows that newspapers, periodicals and the like knew with certainty that the Sherman Act did not involve "labor"—the statute was not intended to apply to labor.

The decisions under the Sherman Act to 1908.

A complete collection and discussion of the decisions by the "lower" Federal Courts under the Sherman Act is given by Berman "Labor and the Sherman Act," at pp. 57-75. His collection, analysis and criticism is complete and authoritative. To avoid repetition we respectfully refer the Court to the place so indicated.

One fact we call attention to is this Court's decision in *In Re Debs*, 158 U. S. 564, at 599-600, decided in 1895 where this Court *carefully* avoided the approval of the District Court's opinion as based on its application of the Sherman Act of 1890. This Court chose to rest the decision on other grounds.

So the first square decision by this Court on the question of the applicability of the Sherman Act to labor unions is the *Danbury Hatters* case, *Loewe* v. *Lawlor*, 208 U. S. 274 (1908). We have already quoted from that case with reference to the question of "Congressional intent" (208 U. S. 301) and have shown, we believe, the error to which this Court was led with reference thereto. Berman, opus cited at pp. 77-86, discusses and analyzes this case. Consider this decision in the light of Berman's analysis of the earlier cases, one of which (*U. S.* v. *Workingmen's Council*, 54 Fed. 994) (1893) is cited by this Court as an authority for its decision.

The traditional legal technique of differentiation, distinguishing facts, examining bases of decision may well be employed in performing the legal "operation" with the *"stare decisis"* tools upon the decision of *Loewe* v. *Lawlor*. We prefer, however, to rest our contentions on the broadest grounds. *Loewe* v. *Lawlor* is bad law. It should be overruled.

Contrast the departure from the Congressional intent in *Loewe* v. *Lawlor* with the learned decision of Roscoe Pound in *Cleland* v. *Anderson*, 66 Nebr. 252, 92 N. W. 306 (1902). The latter decision breathes the spirit of the intent concerning labor unions during the congressional debate. This analysis and this decision are sound; labor and capital are not alike, and in determining legislative intent in "Anti-Trust Legislation" due recognition should be given to that factor of social difference.

Contrast *Loewe* v. *Lawlor* with the decision and reasoning in *State* v. *Coyle*, 8 Okla. Cr. 686, 130 Pac. 316 (1913), where the Court holds that an Anti-Trust Act exempting labor unions is not contrary to Constitutional command.

Summary.

Loewe v. *Lawlor* though decided on a misapprehension of the Congressional intent has been accepted as determining that the Sherman Anti-Trust laws applied to labor unions. We respectfully submit that the decision does not stand up under sound analysis and impartial historical research. It was erroneously decided, it has been erroneously applied in labor cases, it is still subject to the blight of the original error, and should be overruled by this Court.

II.

By the passage of Section 6 of the Clayton Act of 1914, Congress intended to overrule this Court's decision in Loewe v. Lawlor.

A. The true Congressional intent of Section 6 of the Clayton Act was to reiterate the original intention of the Sherman Act of 1890.

1. Economic and Social Background of Section 6 of Clayton Act.

In 1914 Congress reconsidered the entire problem of "Anti-Trust" legislation. The decisions by this Court, and the various trial Courts under the Sherman Act did not satisfy the people of this country.

Accordingly the Democratic Congress, including numerous Progressive Republicans, in accordance with the Democratic platform of 1912, and in accordance with the philosophy of President Woodrow Wilson's "New Freedom," set about to "solve" the trust problem.

The results were the various bills that finally culminated in the Clayton Act of 1914. (Volstead: 51 Cong. Rec. 9077, gives historical summary of this legislation.)

It was again recognized that labor and capital did not stand on the same footing.

(Bailey 51 Cong. Rec. 9155-9156.)

As finally enacted Section 6 read as follows:

> "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual

help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." (Oct. 15, 1914, Chap. 323, Sec. 6, 38 Stat. 731; 15 U. S. Code, Sec. 17.)

(2) Legislative History of Section 6 of Clayton Act.

Our contention under this heading is the same as under I, *supra*. Our technique is substantially the same. There is, however, no authoritative condensation of the history of this Act, and of necessity we have been therefore required to quote at length from Congressional records.

In tracing the history of this statute we see that there were numerous proposals to amend the bill as originally proposed.

The bill as originally introduced in the House did not fully exempt labor from the Anti-Trust laws.

As reported with amendments by the House Judiciary Committee, Section 6 of the Clayton Bill, relating to labor unions contained only the following sentence.

"that nothing in the anti-trust laws shall be construed to forbid the existence and operation of fraternal, labor, consumers, agricultural or horticultural organizations, orders, associations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, orders, or associations from carrying out the legitimate objects thereof."

H. Rept. No. 627, 63rd Cong. 2d Sess. to accompany H. R. 15657. In this form, and as it went through Congress, Sec-

tion 6 was numbered Section 7, and is so designated in the debates which we quote *infra*.

(Note the words: "existence and operation." That is what Justice Pitney in *Duplex Press* v. *Deering*, said the final draft of this statute meant.)

With respect to this proposed bill, Congressman Kelly said:

> "This section properly amended, will help to write the gospel of humanity into the law. It is a recognition of the fundamental difference between human labor and the products of labor. Legislation dealing with trusts can not be justly applied to the association of workers for their own betterment and approval. . . . I stand for the right of labor to organize for its own advancement and to work for that purpose without being outlawed for it."
>
> (51 Cong. Rec. 9086.)

In the course of the debate on this section as it then read it was pointed out that its limited language failed to accomplish its purported purpose of exempting labor unions from the anti-trust act.

See Congressmen Floyd (51 Cong. Rec. 9166), McDonald (*id.* 9249), Volstead (*id.* 9082).

The basis of this objection was that the language of the bill in its then state only protected the "existence of labor organizations" and not "the exercise of their vital functions."

It was recognized that the Sherman Act of 1890 as enacted had been accepted by the Senate as having the same meaning as the proposed Sherman bill that expressly exempted labor (51 Cong. Rec. 9540). And it was further argued that in 1890 the Congress did not intend to prohibit

"farmer's unions" from fixing prices for their products (51 Cong. Rec. 9540). But in order to meet the vital objection that the original Clayton bill did not fully protect labor from the Anti-Trust Laws, several amendments were offered (51 Cong. Rec. 9538). On June 1, 1914, the so-called Webb amendment added to Section 6 the following clause:

> "nor shall such organizations, orders, or associations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws" (51 Cong. Rec. 9538).

The meaning of this amendment is given by Congressman Henry in the following extract:

> (Mr. Henry)—"Mr. Chairman, there has been so much controversy about what was intended when the original Sherman Antitrust Law was passed that I think we should make clear just what was intended by this law. Some of us do not believe Section 7 as originally written by the Committee on the Judiciary expressed exactly what should be in this bill. Therefore, we took exception to the language of the first part of the paragraph in Section 7 and insisted there should be additional language. Among others who agreed that the language was not plain enough were the gentleman from North Carolina, Mr. Kitchin, the gentleman from Illinois, Mr. Hinebaugh, the gentleman from Illinois, Mr. Graham, the gentleman from Iowa, Mr. Towner, the gentleman from Maryland, Mr. Lewis and myself. We met to confer, and concluded that we ought to make the language more explicit. In that conference held in the Committee room of the Committee on Rules, on the evening of May 21st, 1914, we agreed that this language should be added at the end of the first paragraph of Section 7, to wit, after the word

'thereof': 'nor shall such organizations, orders, or associations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.'

"This language I have read is exactly the verbiage used by the gentleman from North Carolina (Mr. Webb) in the amendment offered by him and is the amendment agreed upon by Mr. Kitchin and our conferees in my office. The Committee on the Judiciary courteously accepted the language as proposed by the gentleman in the conference, believing I assume that we were correct and that the original language used by them was not explicit. So we came to a satisfactory agreement with the House Judiciary Committee about this addition to the first part of Section 7, and, so far as I am concerned we are standing squarely with the Committee for that paragraph with our added language. *We called into the conference with us the heads of the American Federation of Labor and submitted this amendment to them, and said to them that we believed its adoption as an addition to Section 7 would clearly exempt labor organizations and farmers' organizations from the provisions of the antitrust laws.*

"They agreed with us; they called their counsel into the conference with us and we *all concurred that this amendment added to the paragraph of Section 7 would give these organizations what they have desired so long, and all they have been struggling for since the original enactment of the Sherman antitrust laws.*

"In my judgment, when Congress was dealing with 'combinations in restraint of trade' *it never intended* that the law should apply to labor organizations or farmers' organizations without capital and not for profit. *The courts took a different view of it and construed the Act as it was never intended that it should*

be interpreted. The time has come when we can *correct that error* and write the language in the law as those gentlemen insist that it should be and should have been * * * (51 Cong. Rec. 9540).

"Now gentlemen, organized labor has never asked that they be permitted under the law to commit crimes or to do unlawful things. They have never come to this government and pleaded for special privileges. They have never asked for anything to which they are not entitled at our hands. They have said that when we are dealing with **conspiracies in restraint of trade and combinations and trusts** *it was never intended that the man who sells his labor*—his God-given right—*should be classed as conspiracy against trade or any unlawful combinations against the antitrust laws.* We are now about to correct that *error,* and make it plain and specific, by clear-cut and direct language that the antitrust laws against conspiracies in trade shall not be applied to labor organizations and farmers' unions." * * * (51 Cong. Rec. 9541). (Italics ours; bold face, author's).

A reading of the debates conclusively shows that Congress intended to correct the error that the courts had committed in rejecting (by judicial legislation) the intent of the sponsors of the Sherman Act to exempt labor unions. After the passage of Section 6 of the Clayton Act, Congress believed that the meaning could not be denied! Labor was to be exempted from the Anti-Trust Laws.

Congressman Thomas used the following forceful language:

"* * * These anti-trust laws are intended for the suppression of monopolies and trusts. Who ever heard of an agricultural trust? Who ever heard of a laborer's trust? * * * (51 Cong. Rec. 9545).

See, for example, the following Congressmen substantially expressing the same thought:

McDonald, 51 Cong. Rec. 9545.
Konop, 51 Cong. Rec. 9545.
Quin, 51 Cong. Rec. 9546 (strongly criticizing the courts for their interpretation of the Sherman Act).
Towner, 51 Cong. Rec. 9548.
Johnson, 51 Cong. Rec. 9549.
Barkley, 51 Cong. Rec. 9553.
Raker, 51 Cong. Rec. 9551.
Crosser, 51 Cong. Rec. 9556.
Casey, 51 Cong. Rec. 9557.
Lewis, 51 Cong. Rec. 9565.
LaFollette, 51 Cong. Rec. 9573.

Congressman Hensley said that labor organizations should "not be affected" by the Sherman Law.

This Webb amendment was adopted without a single dissent; 207 ayes, no nays (51 Cong. Rec. 9567).

Some Congressmen believed that even the Webb amendment failed to put labor outside "the pale" of the Anti-Trust laws, *i. e.*, they wanted even stronger language. The house rejected this contention and an accompanying "strengthening" amendment (51 Cong. Rec. 9569). The House believed that the meaning was clear—no stronger language was needed.

In the House it was conceded that the principle of labor not being a commodity carried with it as a *necessary* implication, its complete exemption from the provisions of the Sherman Antitrust Law.

Congressman Murdoch said:

> "I am in favor of a law here which will directly in terms exempt labor unions from the provisions of the

> Sherman antitrust law. I do so because I believe, in the first instance that labor is not a commodity" (51 Cong. Rec. 9568).

Congressman Lewis believed that Section 6 as proposed in the House (June 1, 1914) placed "American workmen where the British workman was placed by Parliament in 1906." He predicted that if the measure would be enacted into a law it would become known as the "Great magna charta of American workmen" (51 Cong. Rec. 9565).

The bill as thus passed by the House was then transmitted to the Senate on June 5th, and Section 6 of the House bill was reported by the Senate Judiciary Committee to the Senate virtually unchanged.

The debates in the Senate indicated the intention of the Senate to exempt labor unions from the Anti-Trust laws.

The Senate debate on the bill indicated certain Senators doubted whether Section 6 as submitted by the House and including the Webb amendment had completely exempted labor unions from the Anti-Trust laws.

On Aug. 17, 1914, in discussing H. R. 15657 in the Senate, Senator Thompson reopened the discussion with the statement that

> "• • • one of the most important features of the pending bill commonly known as the Clayton Act or anti-trust bill—H. R. 15657—is the exemption of labor and farmers' organizations from the operation of the Anti-Trust laws" (51 Cong. Rec. 13844).

In the discussion between Senators that followed it was clear that the purpose of the legislation being considered was the "exemption of labor and farmer organizations" (51 Cong. Rec. 13845).

Senator Cummins, one of the Senators who wished to conclusively exempt labor, introduced his amendment containing the clause "that the labor of a human being is not a commodity or article of commerce."

The amendment intended by Mr. Cummins to the bill H. R. 15657, 63 Cong. 2d Sess. Aug. 19, 1914 is as follows:

> "Sec. 7. That the labor of a human being is not a commodity or article of commerce, and nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor organizations having for their objectives bettering the conditions, lessening the hours or advancing the position of labor, nor to forbid or restrain individual members of such organizations from carrying out said objectives in a lawful way; nor shall said laws be construed to prevent or prohibit any person or persons, whether singly or in concert, from terminating any relation of employment or from ceasing to work or from advising or persuading others in a peaceful, orderly way, and at a place where they may lawfully be, either to work or abstain from working, or from withholding their patronage from a party to any dispute growing out of the terms or conditions of employment or from advising or persuading other wageworkers in a peaceful and orderly way so to do and from paying or giving or withholding from any person engaged in such dispute any strike benefits or other monies or things of value, or from assembling in a peaceful and orderly way for a lawful purpose in any place where they may lawfully be, or from doing any act or thing which might lawfully be done in the absence of such dispute. Nothing contained in said antitrust laws shall be construed to forbid the existence and operation of agricultural, horticultural or commercial organizations instituted for

mutual benefit without capital stock and not conducted for the pecuniary profit of either such organization or the members thereof or to forbid or restrain such members from carrying out said objectives in a lawful way."

There was considerable debate. Finally debates were ordered brought to a close on August 29, 1914 to vote on the Cummins amendment (51 Cong. Rec. 14364).

The conflict was between Section 6 as reported by the Senate Judiciary Committee with the Webb amendment, and the amendment proposed by Senator Cummins above cited. But it is clear that both sides were seeking the same result: exemption of labor from the Anti-Trust Laws. The dispute was simply concerning the "means."

The discussion on September 2, 1914 between Senators Pittman and Cummins indicates the unanimity of intention:

Mr. Pittman: "The bill, as reported by the Committee intends to exclude such organizations from the purview of this statute and I believe it does; and if I did not believe it did so I would offer an amendment to that effect. . . . The very object of this legislation is to eliminate that discretion. . . . Now *if they cannot be held or construed to be illegal combinations or conspiracies then they are not subject to prosecution under this Act, or not subject to the jurisdiction to the court under this Act.* The last clause of Section 7, which I have just read, carries out the very purpose of organized labor, that is to say, that this legislation has nothing to do with organized labor, *that any unlawful acts committed in the pursuit of the objects of their organizations shall be tried and determined by other existing laws. That is what it means. . . .*" (51 Cong. Rec. 14587-88). (Italics ours.)

Mr. Cummins: "Mr. President, I simply wish to suggest to the Senator from Nevada that in my view he has stated just what Section 7 does not do. Section 7 still leaves every act of a labor union or any member of a labor union to be tested by the anti-trust laws and its lawfulness must be determined by the provisions of the anti-trust laws. That is precisely what I want to avoid by my amendment." (Italics ours) (51 Cong. Rec. 14588).

Mr. Pittman: " . . . I further contend that unless his (Sen. Cummins) amendment contains this clause which is in the Committee report, namely, 'Nor shall such organizations, etc.' he does not remove them from the purview of this statute" (51 Cong. Rec. 14588). (Italics ours.)

Mr. Pittman asserted that the Cummins amendment would only protect the mere *organization of labor* unions, whereas the Committee amendment in substance said that labor unions were not subject to the Anti-Trust Laws (51 Cong. Rec. 14588).

Pittman: . . .

"There are two distinct effects of the act. One of them looks to the dissolution of the union; the other looks to the prosecution of the union or its members under the act. The Senator's (*i.e.* Cummins) amendment seems to me only to go to the first effect, the dissolution of the union, and does not protect the union or the members thereof against action under this act; while the Senate bill, or Section 7 reported by the Committee, does have that effect when it says in very plain and distinct language that such organizations or the members thereof shall not be held or construed to be illegal combinations or conspiracies in

restraint of trade under the anti-trust laws. . . . In plain language it says that those organizations and members thereof shall not be subject to the act" (51 Cong. Rec. 14588).

A compromise was suggested that the committee bill should merely take over the first sentence of the Cummins' amendment, namely, "that the labor of a human being is not commodity or article of commerce." It was argued that both houses would be satisfied, and the desired result of exempting labor would be secured without any doubt.

So the Cummins' amendment *in toto* was rejected. Senator Culberson proposed amendment of Cummins' first sentence (51 Cong. Rec. 14590) was adopted.

So we see that in the House, the Webb amendment was added in order to meet the specific objection that the bill could not accomplish its intended purpose of completely exempting labor unions from the Sherman Act. In the Senate, the Culberson amendment was added for the very *same* reason. Courts should not ignore such plain and undisputed meaning. Senator Cummins' reasoning was expressed:

"I precede the amendment I have offered with the statement that ought to be in the law somewhere for it would solve many of the problems which have vexed the courts and vexed those who have discussed the question, namely, that the labor of a human being is not a commodity or article of commerce.

" . . . if we do not recognize *the difference between the labor of a human being and the commodities that are produced by labor and capital* we have lost the main distinction which warrants, justifies and demands that *labor organizations* coming together for the purpose of bettering the conditions under which they

work, of lessening the hours which they work, and of increasing the wages for which they work, shall not be reckoned to be within *a statute which is intended to prevent restraints of trade and monopoly*" (51 Cong. Rec. 14585). (Italics ours.)

The history of the Gallinger proposal clearly indicates the error committed by Justice Pitney. On August 19th, 1914, Senator Gallinger introduced an amendment to provide "nor shall such organizations *when lawfully conducted* be held or construed to be illegal combinations or conspiracies in the scope of trade under the anti-trust laws" (51 Cong. Rec. 14528, Sept. 1, 1928). (Italics ours.)

Senator Gallinger made two attempts to have his amendment passed. It was defeated (51 Cong. Rec. 14530, 14544). (Yet Mr. Justice Pitney in *Duplex Press* v. *Deering* treated Section 6 as if it read like the rejected proposals of Senator Gallinger.)

On September 2, 1914 just before the vote was taken on the bill as a whole, Senator Gallinger once more protested:

> "In view of the fact that the Senate deliberately refused to agree to the amendment I offered to the bill yesterday, which amendment proposed to insert the word 'lawful' in Section 7, I find it impossible to support the provision as it now stands. I do not think that right-thinking laboring men and women want the privilege of doing anything that is unlawful" (21 Cong. Rec. 14608).

Whereupon Senator Kern, in answer to the protest of Senator Gallinger, introduced an editorial from the "Outlook" of June 14, 1914. This editorial took the view that the provisions of the Clayton Bill did exempt labor unions and should exempt labor unions. The editorial stated:

> "... The real object ... represent the recognition ....of the fact that labor unions ought not to be prose-

cuted under the Anti-Trust Laws. . . . The whole question whether labor unions should come under the operations of the anti-trust law rests upon the question of whether labor is merchandise or not . . . from the point of view of some economists, labor is regarded as a commodity . . . This is the only ground on which the application of the anti-trust laws to labor unions can be defended" (51 Cong. Rec. 14608).

The bill was then passed by the Senate 46 to 16 (51 Cong. Rec. 14610) and as thus enacted was placed on the statute books.

American labor hailed this legislation as labor's "Magna Charta."

See Gompers: "The charter of Industrial Freedom—Labor Provisions of the Clayton Anti-Trust Law," 21 American Federationist, p. 957.

But this rejoicing was premature.

Conclusions from Consideration of the Complete Legislative History of Section 6 of the Clayton Act.

The study of the Legislative History of Section 6 of the Clayton Act indicates that (1) in 1914 labor still persisted in its contention that Congress never intended to include labor unions within the meaning of the Sherman Act of 1890; (2) that labor insisted that the decision of *Loewe* v. *Lawlor* was contrary to Congressional intent; (3) that the workings and mechanics of the legislative process in a democracy from 1908 to 1914 were intended to remove labor from the purview of the Anti-Trust laws; (4) that the Senators and Representatives were in accord with the intent of Labor because they believed labor and capital stood upon different footings; (5) Congress acted in the belief that it had forever "laid to rest" the rule of *Loewe* v. *Lawlor*.

Our conclusion is most strikingly drawn by posing this question: Why should labor be deprived of the protection afforded by Section 6 of the Clayton Act of 1914?

The decision in *Duplex Press* v. *Deering*, 254 U. S. 443 (1921) by a divided court (6 to 3) apparently decides that congressional intent of Section 6 of the Clayton Act is to be disregarded. But let us examine the background of that case.

Decisions Under Section 6 of the Clayton Act.

In *Paine Lumber Co.* v. *Neal*, 244 U. S. 459 (1917) the question of Section 6 was *incidentally* discussed by Mr. Justices Holmes (244 U. S. at 471) where he implies that his opinion (in the minority) was to the effect that the Clayton Act "established a policy inconsistent with the granting" of an injunction against a labor union on the alleged ground of violation of the Sherman Act. But he concluded that under the Sherman Act no injunction could be issued in favor of a "private individual", and that since the Clayton Act of 1914 was passed after the decision below it did not apply to the case at bar. But Mr. Justice Pitney speaking for the dissenting minority *foreshadows* his decision in *Duplex Press* v. *Deering* by contending that even in the *absence* of express provision in the Sherman Act permitting an individual to bring an injunction suit equity should grant an injunction against the labor union on the ground that the finding of facts showed "irreparable injury through a violation of property rights and there is no adequate remedy at law * * *" (244 U. S. at 473). He also points out the fact that federal jurisdiction was invoked *both* on the ground of diversity of citizenship and the provisions of the Anti-Trust laws. (244 U. S. at 472.)

In other words Justice Pitney says an injunction should be granted without considering the Sherman Anti-Trust Act.

In *Duplex Press Co.* v. *Deering*, 254 U. S. 443 (1921) the jurisdiction of the Federal Court was invoked on grounds of *both* diversity of citizenship and for alleged violation of the Sherman Act.

With respect to Section 6, Justice Hough of the Circuit Court of Appeals had stated:

> "Insofar as the courts are permitted to study legislative proceedings and contemporary history for aid in statutory interpretation, we consider it plain that the designed, announced, and widely known purpose of Section 20 (perhaps in conjunction with Section 6) was to legalize the secondary boycott." (*Duplex Press* v. *Deering*, 252 Fed. 722, 748) (1918).

Mr. Justice Pitney speaking for the majority of this court held in favor of the argument that had been previously advanced against the labor union in the earlier case of *Paine Lumber Co.* v. *Neal* (See brief of plaintiff in error, 244 U. S. at pp. 467-468).

B. Justice Pitney Erred in Interpreting the Statute and this court should overrule Duplex Press v. Deering.

The issue before the court was whether the Sherman Act as amended by Section 6 of the Clayton Act applied to labor unions. On this issue Justice Pitney speaking for the majority said:

> "As to Section 6, it seems to us its principal importance in this discussion is for what it does not authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares

that nothing in the antitrust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from *lawfully* carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws." (254 U. S. at 469) (italics by court)

We submit that Justice Pitney's conclusion was erroneous in view of the Legislative History of Section 6 of the Clayton Act.

As a matter of precedent, there was no necessity for construing Section 6; it meant just what it said. It said that labor was not to be included within the purview of the Anti-Trust laws. If labor was not included within the purview of the Anti-Trust laws it simply meant that *this* statute did not *prohibit* restraints of trade by labor unions. Where Justice Pitney erred in discussing a "disguise" was in not realizing that if the acts of labor unions were illegal by *other* State and Federal laws they could be prosecuted for violating the same. In refusing to permit labor unions to become "a cloak for an illegal combination" he was simply begging the question—for the

question *was* whether the Sherman Act as modified by Section 6 of the Clayton Act *did* render combinations of labor in restraint of trade illegal.

Reference to the legislative history was made by Justice Pitney 254 U. S. at pp. 474-475. But here again the briefs for the labor union apparently failed to give this court an adequate or complete picture. Here too, we respectfully submit, this court erred in its interpretation of the "legislative history" of a statute.

Merriam, the eminent American historian has summed upon the decisions by this court under the Sherman Act up to 1917—and this would apply with even greater force to *Duplex Press* v. *Deering*,

> "The Anti-Trust Law of 1890 was sustained, but the rule of reason developed in the *Standard Oil and Tobacco* cases left the public mind in a dazed condition as to the real significance of the Act. In dealing with the problems of monopoly and competition and of organized labor and capital, the courts encountered stormy seas, and on the whole did not master the situation. The novel and free use of the courts' veto, the strict application of ancient rules to new situations, entirely alienated the confidence of labor, and resulted in the widespread loss of popular trust in juristic ability to administer even-handed justice in an admittedly difficult situation. Of the three classes of cases, those affecting the prohibition of monopoly, the regulation of industry, the position of organized labor, the court left the public in doubt as to first, perplexed, as to the second, and aroused, united opposition of organized labor as to the third."
>
> Merriam: "American Political Ideas", at pp. 150-151 (1920).

We respectfully urge that *Duplex Press* v. *Deering* be overruled in so far as it purports to determine the legislative intent of Section 6 of the Clayton Act.

III.

Recent Federal legislation indicates congressional recognition of the same economic differences between labor and capital that impelled the Federal Congress to exclude labor unions and their activities from the Federal Anti-Trust Laws.

Recent Federal legislation has indicated congressional intent to remove labor union activities from the application of the Federal Anti-Trust laws.

It is a matter of common knowledge that ever since the decision of this Court in *Duplex Press* v. *Deering*, 254 U. S. 443, labor has constantly renewed its pleas to the Federal Congress to the end that labor union activities be freed from the burden of the Anti-Trust laws whether it be by the more common mode of injunction or the less frequent means of the indictment.

Labor sought to be freed from the effects of the decisions in *Duplex Press* v. *Deering*, 254 U. S. 443, and *Bedford Cut Stone* v. *Journeymen Cutter's Association*, 274 U. S. 37. Under Sections 4 and 5 of the Norris-LaGuardia Act of 1932 it appears as if labor has been successful. (March 23, 1932, Chap. 90, Sects. 4-5, 47 Stat. 70-73; 29 U. S. Code, Sects. 104-105.)

Next, consider the provisions of the Wagner Labor Relations Act. (July 5, 1935, Chap. 372, Sect. 8-3, 48 Stat. 453; 29 U. S. Code, Sects. 159, (3).)

That statute specifically legalizes some of the restraints which the Anti-trust laws have been inter-

preted as preventing. Under the Wagner Labor Relations Act as far as labor is concerned, it may monopolize commerce in the sense that it tends to unionize the entire country—and even though this will result in the rise of prices. The Anti-trust laws were designed to foster competition by preventing combination. The purpose of the Wagner Labor Relations Act is to encourage combination of workers in forming groups for collective bargaining. The Anti-trust laws were passed on the basis of the economic philosophy that individual economic competitive action was the supreme goal. The passage of the Wagner Labor Relations Act was brought about by the irrefutable conclusion that working men are not protected under the strict *laissez faire* economics that were accepted as being applicable to businessmen, but rather that the individual working men must be protected by permitting and encouraging combination. The individual worker was helpless.

The passage of the Wagner Labor Relations Act adds force to our contention that the Anti-trust laws should be construed as the framers intended, namely, that it did not apply to labor.

In effect, the first section of the Wagner Labor Relations Act states the public policy of the United States—which includes the economic policy—that the refusal of employers to accept the procedure of collective bargaining leads to industrial strife and unrest, which has the necessary effect of burdening or obstructing commerce.

The Section concludes with the statement it is the United States' policy to eliminate or mitigate obstructions to the free flow of commerce by encouraging the practice of collective bargaining. Section 8, Subsection 3 provides that nothing in that statute or *in any other statute of the United States* shall preclude an employer from signing a closed

shop agreement. Accordingly, Congress by these sections intended to avoid any application by a Court of the Anti-trust laws for the purpose of preventing labor organizations from carrying out *these* goals.

Yet to declare labor subject to the provisions of the Anti-trust laws may raise a serious conflict between the Sherman Act and the Wagner Act.

Our contention that the Anti-trust laws do not belong to apply to labor results in more complete harmonization of the entire Federal statutory structure.

Thus, as above discussed, and many other examples could be cited, the provisions of the Anti-trust laws are inconsistent with the policies and provisions of the Federal Wagner Labor Relations Act and the Norris-La Guardia Act. To hold that the Anti-trust laws are applicable to the labor organizations seriously impairs the expressed policy and the implied goal of Federal legislation designed to help labor organizations.

IV.

The indictment does not charge a violation of the Sherman Act as it has been construed and interpreted by this Court.

Under this heading, we urge that the indictment does not state facts sufficient to support the charge of a crime against the United States of America under the Sherman Act.

A. If the Sherman Act is not applicable to labor unions and their activities, then the defendants cannot be indicted under this particular statute for causing a restraint of trade.

If the Sherman Act is not to be applied in the criminal prosecution of labor unions then the indictment must fall. The indictment charges that the defendant labor union and

labor union officials conspired with other persons to violate the Sherman Act, If the Sherman Act does not permit the prosecution of labor union officials, *i.e.*, if under the Sherman Act labor union officials cannot be prosecuted for causing restraints of interstate commerce, then it does not make any difference that other individuals may so be prosecuted. We emphasize our contention by repeating: The Federal Congress has indicated that, in so far as the anti-trust laws are concerned, the labor unions and labor union officials are not subject to prosecution for restraints of interstate commerce. This does not mean that we are contending that the Sherman Act "gives" an immunity to labor unions. On the contrary, our contention is that the Sherman Act does not create a *new* obligation or responsibility so far as labor unions or their officials are concerned. Ofttimes, argument has been made that labor unions have claimed the protection of the Sherman Act in order to avoid prosecution or obligation. This argument is unsound. Labor simply claims that the Federal Sherman Act does not impose additional or new obligations on labor unions or their officials.

If the Sherman Act cannot be used as a basis of prosecuting labor unions or labor union officials, does it mean that we are contending that labor unions or labor union officials can avail themselves of their economic and social nature and, therefore, lend themselves to the *purposes* of *those* who *are* subject to the Sherman Act? Assuredly not. If a labor union official becomes an employee or the head of a giant trust, combination or monopoly, does the fact that he has previously been elected to the office of a labor union official serve him a defense to a prosecution for violation of the Sherman Act based upon his status or capacity as such employee or head of a giant business trust? It does not. The salient fact is that as soon as the so-called

labor union official begins to act in a capacity *other* than his social and economic status as such union official, he is acting within the territory circumscribed by the provisions of the Sherman Act, and is, of course, subject to punishment therefor. But, so long as he is carrying on a labor union activity, he cannot be prosecuted under the Sherman Act—not because the Act *confers* immunity, but because the boundaries of the Act do not include him.

It may be argued by the Government that this contention may not be made under the charge in the indictment of a general conspiracy involving all defendants. But that does not answer our contention.

The indictment must not be judged by any isolated sentence or paragraph. The entire context must be considered by the Court in determining the status of the labor union and the officials of the labor union, who are named as defendants in these indictments. First of all, the union is designated as an unincorporated association; the individuals are named as officers of the union. It is shown in one portion of the indictment that they refused to take in as members certain applicants—drivers of milk wagons.

It is also alleged that Leslie Goudie, President of the Joint Council, advised the union and its officers in various activities; it is further alleged that Leslie Goudie, through the instrumentality of the Joint Council, prevented the delivery of daily supplies of groceries and other food products by members of the unions affiliated with the Council to places of business served by independent distributors who refused to purchase fluid milk at the prices fixed by the alleged conspiracy.

Under these allegations we have a complete picture of union activities. Regardless whether these activities are legal or illegal, they are all within the province and purview

of the functions of unions. On that basis, we contend that labor unions are not subject to prosecution under the Sherman Anti-Trust Act.

We must distinguish a labor union stepping out of the sphere of its normal functions, such as a labor union engaging in banking or other commercial activities. We do not claim that it is not possible for a union to depart from its normal activities and engage in general business activities, thus bringing it before the Court as another individual engaged in the claimed wrongful activities. However, it is our contention that a labor union, when engaged in the activities for which it is organized—even though it resorts to illegal means— is exempt from the Anti-Trust laws. There may be other statutes and other laws which provide adequate punishment, but they cannot be punished under the Anti-Trust laws, because their activities, regardless whether the same restrains trade or commerce, are not included within the Act.

B. Even assuming the Sherman Act were applicable to the facts charged in the indictment, the allegations of Counts 1 and 2 as to the fixing of prices is a reasonable restraint of trade by labor unions within the meaning of the decisions of this court construing the statute.

Directing our attention to counts 1 and 2, which charged a conspiracy to fix prices to be paid to the producers and by distributors, respectively, is such a charge of participation by a labor union in the price fixing of the commodity concerning which the union members offer their labor, a violation of the Sherman Anti-Trust Act?

In the case of *Appalachian Coals* v. *United States*, 288 U. S. 344 (1933), this Court in an opinion by Mr. Chief Justice Hughes definitely recognized that the Sherman Act

does not condemn all restraints, and does not condemn restraints which may eliminate competition among the parties to an agreement (288 U. S., 360-361). This Court said that only where the public interests are prejudiced by an undue restriction of competition or undue obstruction of the course of trade can it be said that the Sherman Act is being violated (288 U. S. 360). (Citing exhaustively from the authorities.) This Court emphasized that, in applying the test,

> "... a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment.... It is, therefore, necessary in this instance to consider the economic conditions peculiar to the coal industry...." (288 U. S. 360-361).

The same test should be applied to the facts alleged in the indictment concerning the labor union and its activities.

As a matter of economics, would it be unreasonable for a union to participate in the fixing of prices of the product "handled" by the members of a labor union?

This Court has, in the case of *United States* v. *Trenton Potteries*, 273 U. S. 392 (1926), struck down price-fixing agreements on the ground that they are in restraint of trade and violation of the Sherman Act (273 U. S. 399-401). But that is price fixing by competitors. At the expense of repetition, but in accordance with history and fact, we again state, labor and capital do not stand on the same footing. All reasonable-minded persons agree that a healthy society is premised upon a high standard of living for the working man. Economists agree that there is a high correlation between the prices paid by the consumer for the finished product and the wages paid to those whose labor enters into the production of such product. The defendant unions

cannot obtain the desired wage for its members unless the price paid by the consumer is sufficient to enable the employer to pay such rate to the working man. This is a question of economics. If there is a conflict in economic theory, at the very least the union has reasonable grounds to maintain such a position. There is no such great divergence between conflicting economic theories that should warrant a Court in deciding that the Sherman Act adopted one theory of economics and rejected another. This question of conflicting economic theories should be left to the proper jurisdiction for economic competition, namely, the industrial and business world. In other words, we urge that, if there is any restraint of trade resulting from an attempt by a labor union to fix the prices of its product, it is a reasonable restraint within the meaning of the rationale of *Appalachian Coals* v. *United States.*

In the case of *National Association of Window Glass Manufacturers* v. *United States*, 263 U. S. 403 (1923) this court applied the "rule of reason" in a case involving a labor union. There, as charged in the indictment in the case at bar, the unions entered into an agreement with the employers which limited the production, the operation, increased prices and the like. Yet this court unanimously, in an opinion by Mr. Justice Holmes, held that such an agreement was not prohibited by the Sherman Act, on the ground that the economics of the situation justified the arrangement between the unions and the employers even though it was national in scope. This case is squarely in point insofar as justifying the defendant union insofar as the charges of Counts I and II are concerned. This case makes it clear: the economics of the situation must be considered.

To the same effect, see the dissenting opinion of Justice Brandeis, in *Bedford Stone Co.* v. *Journeymen's Association*, 274 U. S. 37, at 58, (1927).

The laws of economics offer ample social justification for activities by unions in fixing of prices to the consumer provided that the purpose of such fixing of prices is to raise wages of the union working man. The legislative debates and the passage of both the Sherman Act of 1890 and Section 6 of the Clayton Act of 1914 recognized such economic justification. The legislatures recognized that labor does stand on a different footing than capital, and that accordingly labor should be exempted from legislation that tends to prohibit price fixing by other kinds of organizations. In other words if the purpose of the unions and its officials was to protect or better the working conditions of the union working man, then the charges in Counts I and II do not amount to a charge of a crime under the Sherman Act.

It is true that there is no evidence at the present stage of the case, but the indictment does not charge that the union participated in the fixing of prices that were unreasonable to the consumer, nor does it in any way negative the undoubted conclusion that the activities of the union and its officials in the case at bar were carried out in attempting to protect and better working conditions of its members.

Under such a view of the case, it is respectfully suggested that the price fixing comes within the so-called reasonable restraints of trade which are permitted under the most recent decisions of this Court. Unless this court adopts a rule that price fixing by labor unions is a violation *per se* under the Sherman Act, then Counts I and II do not charge a crime within the meaning of the Sherman Act in so far as the defendant union and its officials are concerned.

The court should also distinguish between the several different kinds of overt acts alleged in the indictment.

For example, the charges in Counts I, II and IV that the defendant union and its officials participated in a conspiracy to violate the Sherman Act by denying membership in Local 753 to duly qualified drivers in employ of certain independent distributors. It is the law that the union being a voluntary association may prescribe such rules for admission to membership as it sees fit and that no individual who is excluded thereby has ground for claiming that such exclusion is illegal. This is conclusively established by the leading case of *Pickett* v. *Walsh*, 192 Mass. 572 at page 583, 78 N. E. 753 (1906).

In the case of *Kemp* v. *Division Amalgamated Association, Etc.*, 255 Ill. 213, (1912), the Illinois Supreme Court recognized the right of labor unions to make their own rules for admission to membership and to work with whomsoever they saw. 255 Ill. at 227.

For other cases holding in substance that unions can make their rules concerning the terms upon which they will work for other individuals see *Barker Painting Company* v. *Brotherhood of Painters*, 23 Fed. (2d) 743, 745 (1927); *Rambusch* v. *Brotherhood of Painters*, 105 Fed. 2d 134 (1939), (certiorari denied by Supreme Court of United States October, 1939).

C. Even assuming the Sherman Act is applicable to labor unions or their activities, the facts charged in the indictment do not show a direct, substantial or unreasonable restraint of interstate commerce or trade by the defendants within the meaning of the decisions of this court.

The problems of (1) interstate commerce and (2) the restraints that are prohibited by the Sherman Act are being discussed at length in the briefs of other defendants.

In addition to such presentation, the defendants in this brief state that this court has several times held that unions

are not violating the Sherman Act unless there is a restraint on interstate commerce, and unless such restraint is substantial, direct and unreasonable.

United Mine Workers v. *Coronado Coal Co.*, 259 U. S. 344, 403, 407-408 (1922).

United Leather Workers v. *Herkert Co.*, 265 U. S. 457, 471 (1924).

Levering & Co. v. *Morrin*, 289 U. S. 103, 107 (1933).

An examination of the indictment does not disclose facts which show the union guilty of causing a direct, substantial and unreasonable restraint of commerce within the meaning of the aforesaid cases.

The case of *Highland Farms* v. *Agnew*, 300 U. S. 608, 615-616 (1937) decides that sale of milk by a dairy within a state is not a sale in interstate commerce even though the dairy purchased the milk in bottled form outside the state. The union in Chicago was not "directly" burdening interstate commerce.

V.

Under Section 8 of the Sherman Act, a labor union being a voluntary, unincorporated association is not a legal entity, and cannot be indicted for an alleged criminal violation of Section 1 of the Sherman Act.

A Federal Grand Jury sitting in Illinois could not properly indict a voluntary unincorporated association as Milk Wagon Drivers' Union, Local 753, because under the substantive law of Illinois such voluntary unincorporated association was not a legal entity and therefore had no legal capacity to be indicted within the meaning of Section 8 of the Sherman Act.

The Government will probably not dispute the fundamental proposition of law that a voluntary unincorporated association is not by the common law a legal entity, and is not therefore a person in law. Hence, unless authorized by statute a voluntary unincorporated association as such has no legal capacity to sue or be sued. There is no "it."

Moffat Tunnel League v. *United States*, 289 U. S. 113, 118 (1933) and also see various cases therein cited.
4 Am. Juris 485, Sect. 46.
63 Corpus Juris 703, Sect. 91.
5 Corpus Juris 1369, Sect. 118.
7 Corpus Juris Sect. 43, Sect. 17.

The Illinois case of *Cahill* v. *Plumbers' Union*, 238 Ill. App. 123, at Page 127 (1925) recognizes the common law rule to the effect that a trade union being a voluntary unincorporated association could not be sued at law as an entity, *i.e.*, in its association name, all of its members must be named and sued as defendants.

The question is whether under Section 8 of the Sherman Act considered by this Court in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344 (1922) and *Brown* v. *United States*, 276 U. S. 134 (1928) can a voluntary unincorporated association such as a trade union be indicted by Federal Grand Jury in Illinois for an alleged violation of criminal provisions of the Sherman Act?

In the first place, we contend that the decision whether a trade union possesses the requisite legal capacity to be indicted is a question that must be governed by the law of the "situs," *i.e.*, Illinois.

Under the decisions of this Court in *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938) and *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202 (1938), it is sub-

mitted that the general question of the legal capacity of a defendant to be indicted for a crime is a question of the substantive law of the State, and that the Federal Courts are bound to follow the substantive law of the State.

In the case of *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, this Court said:

> "The parties and the Federal Courts must now search for and apply the entire body of substantive law governing *an identical action* in the State Courts." 304 U. S. at page 209 (Italics ours).

It cannot be disputed that under an identical action in the State of Illinois the Courts would there hold that a trade union, not being a person recognized by law, could not be indicted. *Cahill* v. *Plumbers' Union*, 238 Ill. App. 123.

The question of legal capacity is a question of the substantive law of Illinois. The provisions of Section 8 of the Sherman Act logically should not govern such substantive law. In *Panko* v. *Endicott Johnson Corporation*, 24 Fed. Supp. 678 (1938), the Court accepts without any questioning the defendant's contention that capacity to sue must be determined by the law of the State of New York and not by the law of the Federal Courts sitting in New York.

It has been similarly held that the question of capacity to sue in the Federal District Court within the meaning of 28 U. S. C. A. Sect. 725 is governed by the State law of the District in which the Federal Court is located.

Texas and Pacific Railway v. *Humble*, 97 Fed. 837 (Affirmed 181 U. S. 57) (1901).

Johnson v. *City of St. Louis*, 172 Fed. 31 (1909).

New York Evening Post v. *Chalnor*, 265 Fed. 204 (certiorari dismissed 262 U. S. 59).

Second, even assuming that the principle in *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938) is not applicable, we then contend that the decisions in the *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344 (1922) and *Brown* v. *United States*, 276 U. S. 134 (1928) are not applicable to the case at bar.

The decision in the *Coronado Coal* case is analyzed and examined at length by Prof. Edward W. Warren in "Corporate Advantages without Incorporation" (1929) Chap. IX, Pages 648 to 669.

Was Local 753 an association existing under the laws of either the United States or of any State? In Illinois it has been held that a labor union cannot be incorporated under the Illinois statutes pertaining to corporations not for profit. *People ex rel. Padula* v. *Hughes*, 296 Ill. App. 587 (1938).

The opinion of the Attorney General of Illinois is to the effect that a labor union may not be incorporated under the Business Corporation Act, *i.e.*, corporations for profit. See 1937 Opinions of the Attorney General of Illinois, p. 78, No. 1035.

It is submitted that Local 753 was neither existing under or authorized by the "laws" of the state of Illinois. As a matter of law "it" could not so exist as an entity.

This Court in the case of *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 118 (1932) recognized that voluntary unincorporated associations which were organized for the purpose of developing commercial interests and adequate transportation facilities, in the one case made up of individuals and in the other case made up of clubs, towns and irrigation companies, were not "organized pursuant to or recognized by any law." This Court recognized that in the absence of action by the Legisla-

ture, *i.e.*, by the sovereign power, there was no legal personality. 289 U. S. at 118. It is a fundamental proposition that

> "the Courts should not treat any body of men as a legal unit without the consent of the Sovereign." Prof Edward W. Warren in "Corporate Advantages without Incorporation," at Page 8, and many decisions there cited.

The words of Section 8 of the Sherman Act do not create legal entities. Neither do the *United Mine Workers* v. *Coronado Coal Co.*, 249 U. S. 344 (1922) and *Brown* v. *United States*, 276 U. S. 134 (1928) hold that Section 8 of the Sherman Act indicated Congressional intent to create *legal entities.*

In the opinion by Mr. Chief Justice Taft in the case of *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344 (1922) after referring to the numerous state statutes concerning trade unions, the Chief Justice pointed out that the question of suability of trade unions is:

> "• • • after all in essence and principle merely a procedural matter." 259 U. S. at 390.

This Court, as the language quoted and the surrounding context indicates, was concerned simply with a "procedural" problem where under the substantive law the union members were liable to the plaintiff and where the members had voluntarily concentrated their strength in a self acting body "they may not be sued as this body and the funds they have accumulated may not be made to satisfy claims for injuries unlawfully caused in carrying out their united purpose." 259 U. S. at 390-391.

This Court did not intend to and did not in fact decide that a trade union was a legal entity or that Section 8 of the Sherman Act conferred upon them the attributes of

a legal entity. Entities are created by "corporation" statutes. The decision in the *Coronado* case did not attempt to change the essential nature of the voluntary unincorporated association.

Even assuming Section 8 of the Sherman Act creates procedural rights so that an association may be the object of certain proceedings under the Sherman Act, we contend that there is no intent expressed in the statute to confer such legal capacity upon the unincorporated voluntary association so that such association could be indicted and convicted for a criminal offense. Legal capacity to be subject to an indictment must be affirmatively designated by the act of the Sovereign. As we have shown *supra*, the Sovereign has not so acted.

In the case of *Ex parte Edelstein*, 30 Fed. (2d) 636 (C. C. A. 2, 1929) Judge Learned Hand pointed out that the *Coronado* case merely decided first, that the common funds of the union members were subject to a suit at law, and second, that individual liabilities of the union members could be enforced. He stated:

> "We do not, therefore, think that there is even an intimation that the Supreme Court meant to change the doctrine that such associations are aggregations, the political status of whose members is as little enlarged as though they were partners in an ordinary commercial or industrial enterprise. Indeed, in the case of corporations themselves, in recent times the tendency has been rather to emphasize their aggregate character than their fictitious personality, an exotic in any case in English law." 30 Fed. (2d) at 638.

This Court has recognized the *aggregate nature* of unincorporated associations—as distinguished from the entity—even though the unincorporated association

1. was organized under the laws of a State (*Chapman* v. *Barney*, 129 U. S. 677)
2. was considered as a "quasi-corporation" (*Great Southern Co.* v. *Jones*, 177 U. S. 449)
3. was sitting as a Board of appointed officials with public duties. (*Thomas* v. *Trustees of Ohio State University*, 195 U. S. 207.)

Similarly in *United States and Cuba Corporation* v. *Lloyds*, 291 Fed. 889 (1923), Judge Learned Hand, then District Judge, stated that in the *Coronado* case this Court was interested in the questions whether union funds could be reached on execution—and that was all. 291 Fed. at Pages 891-892.

The mere recognition in Section 8 of the voluntary association as a body which may be proceeded against for *some* purposes does not result in the association's acquiring an entity. Otherwise consider the result of statutory recognition of procedure concerning "partnerships," "societies," "trusts," "estates," "firms," "committees," "companies," "two or more persons having a joint or common interest," "a body incorporate" and any "other unincorporated body of individuals." These groups have been recognized by statutes for various purposes substantially as Section 8 of the Sherman Act recognizes "associations." It cannot be contended that these "associations" have become legal entities.

What is meant by "laws" of Section 8?

We submit that that word means "statutes."

In the ordinary use of language, "laws" means statutory laws. If all rules and regulations governing the human conduct be meant, the appropriate expression is "the law," not "laws." This association is not included.

then, because it does not exist under, nor is it authorized to exist by, any statute.

In the second place, of what is "existing under or authorized by" descriptive,—of "associations" only, or of "corporations" also?

A natural reading of the statute indicates that the words are descriptive of both. If so, is there a difference between a corporation "existing under or authorized by" the laws of a state, and one "organized under" those laws? It would seem not. Logically these words should not have any different meaning when applied to "associations." The only possible difference is that the expression "organized under" connotes an affirmative statute which grants privilege or powers, upon compliance therewith, while the expression "existing under or authorized by" connotes a passive, declaratory statute, which merely states, in effect, that which has been lawful shall continue to be so. If the two expressions be essentially the same, then only those associations have been given an entity which have acquired, by statute, a quasi-corporate existence. The trade union being a voluntary unincorporated association has no such quasi-corporate existence.

In addition, in the *Coronado* case, the opinion *strongly* relies on the existence of the Federal statute permitting the incorporation of trade unions as national unions by the Act of Congress approved June 29, 1886, C. 567, 24 Stat. 86. It may be argued that the sovereign *intended* to confer "legal personality" on unions by this incorporation act.

But this latter statute was repealed in 1932. See 47 Stat. 741; Act approved July 22, 1932, c. 524. The sovereign's intent no longer exists.

In the case of *Edward Hines Trustees* v. *State*, 130 Miss. 348, 94 So. 231 (1922) it was held that an unincor-

porated association could not be indicted for a crime—there is no "it."

7 C. J. Sec. 43, Sect. 17.

We respectfully urge that an unincorporated association is not a legal entity under Section 8 of the Sherman Act, and therefore does not possess "legal capacity" to be indicted.

CONCLUSION.

Defendants Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred Dahms, F. Ray Bryant, John O'Connor, and David H. Riskind urge that the ruling of the District Court sustaining these defendants' demurrer to the indictment be sustained for the various "common" questions of law urged by the various other defendants and the particular reasons urged in this brief.

Respectfully submitted,

ROBERT G. FITCHIE,
JAMES G. KENNEDY,
STEVE C. SUMNER,
FRED DAHMS,
F. RAY BRYANT,
JOHN O'CONNOR,
DAVID H. RISKIND,
Certain Appellees.

by JOSEPH A. PADWAY,
Attorney for Appellees.

DAVID A. RISKIND,
ABRAHAM W. BRUSSELL,
Of Counsel.